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No. 80-175

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

WOODLANDS TELECOMMUNICATIONS CORPORATION,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS RESTATED

1. Should the petition be granted to review the Court of Appeals' holding that the existence of FCC power to compel interconnection to the toll network is relevant to the question whether Bell has monopoly power?

2. Should the petition be granted to review the Court of Appeals' holding that the regulatory policies embodied in Section 201(a) of the Communications Act are relevant to the question whether a refusal to interconnect voluntarily is a misuse of monopoly power?

3. Should the petition be granted to review the Court of Appeals' *sua sponte* footnote reference to the effect of federal income taxation on antitrust recoveries?

4. Should the petition be granted, in any case, when the case has been remanded because of errors not only with respect to liability but also as to damages, primarily on grounds *not* presented for review by the petition, and when retrial will be necessary in any event?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Woodlands Telecommunications Corporation ("WTC"), seeks review of a decision of the United States Court of Appeals for the Fifth Circuit which reversed an antitrust judgment against respondent and remanded the case for a new trial. Although the Court of Appeals' opinion accurately summarizes the facts, *see* Appendix at A-2 - A-4, A-32 - A-33, a brief statement is necessary to correct serious misstatements contained in the petition.

This case arises from a controversy concerning the provision of telephone service in the "Woodlands", a community being developed near Houston, Texas. Respondent, Southwestern Bell ("Bell"), has provided telephone service in this part of Texas for several decades, in accordance with duly published tariffs (Tr. 546-47, 3058-59), and the major portion of the Woodlands development is within Bell's Spring exchange. (Appendix at A-33; Tr. 1765).

Because Bell is a common carrier with an obligation to provide service upon request, it has always monitored population growth and development trends in order to plan and construct facilities necessary to satisfy growing demand. Having forecast future development in the area that includes the Woodlands site, Bell had committed itself to construct new facilities in its Spring exchange even before it learned of the Woodlands development. (Tr. 2065-66, 3281-85).

After the Woodlands development plans were announced, Bell advised the developer, Mitchell Energy & Development Company ("Mitchell"), that Bell was prepared to serve that portion of the Woodlands that was within its tariffed exchange areas. (Tr. 831-33). Subsequently, however, Mitchell approached Bell to determine whether it would make payments to the development in exchange for "permission" to provide service. (Tr. 859, 1172-73). Bell refused because to make such payments would have been inconsistent with its obligations as a regulated common carrier and company policy. (Tr. 861, 867-68, 896-97). Mitchell then entered into an agreement with Mid-Texas Communications Systems, Inc. ("Mid-Texas") to form petitioner, WTC, to provide telephone service within the Woodlands, irrespective of existing tariff and exchange areas. (Tr. 1777; DX 92, 284).

Because WTC needed access to Bell's toll facilities in order to provide long distance service to future subscribers, it proceeded to request toll connections. (Tr. 625-26, 628). Although Bell declined voluntarily to interconnect with WTC, it advised WTC that the Federal Communications Commission ("FCC") had the power to order interconnections if it were found to be in the public interest and that Bell would obey any interconnection order of either federal or state authorities. (DX 119; Tr. 759). The reason Bell took these actions was that its established tariffs required it to provide service within the area, and it had already made a substantial investment in planning and constructing facilities needed to meet the growth of demand in the area. It thus believed that

wasteful duplication of facilities and service would inevitably result from a second local telephone company, and its concern was that interconnection would be contrary to the public interest and to the interest of all telephone subscribers in the area. *Ibid*; *see* Appendix at A-32 - A-33.

The *only* way that these substantial public interest issues could be appropriately considered was for Bell to deny interconnection and allow the matter to be submitted to the appropriate authorities for determination. *See* Appendix at A-31.

On November 9, 1972, WTC filed an informal complaint with the FCC seeking the interstate toll connections that it had requested. (DX 285; Tr. 1647, 2984). This complaint, however, was withdrawn on August 3, 1973 after a vote of the directors of WTC. (DX 204; Tr. 1848-52). While the Petition asserts (p. 6) that "economic coercion" from Bell caused it to withdraw the complaint, this assertion ignores the undisputed facts. The minutes of the WTC's directors meetings indicate that the directors had been concerned that unless the complaint were withdrawn, there was a substantial risk that the FCC might deny WTC's petition and WTC therefore "would lose any chance it might have to sue Bell at a later date." (DX 201). The directors further recognized that even if the FCC were to order interconnection, WTC would have to compete with Bell for subscribers within the development. (Tr. 1735-37; DX 201).[1]

After the complaint was withdrawn before the FCC, WTC filed this suit claiming that Bell's refusal voluntarily to interconnect constituted monopolization in violation of §2 of the Sherman

[1]The sole evidence offered in support of WTC's claim of coercion consisted of 13 acts relating to the day to day relationship of Bell to Mid-Texas, one of WTC's promoters. (Tr. 997-99). However, nearly all the items on this list arose before Mid-Texas became involved in WTC (Tr. 3199), and Mid-Texas did not regard any of the items as having any bearing upon the interconnection dispute until long after this case was filed. (Tr. 3188).

Act. Following a jury verdict, the district court entered judgment against Bell of $55 million. On appeal, the Court of Appeals rejected respondent's claim that all of its conduct was immune from antitrust liability. *See* Appendix at A-6 - A-21. However, it reversed the judgment and remanded for a new trial as to both liability and damages. On liability, it held the trial court had erred in (1) holding that Bell's direct dealings with the FCC could be a basis for liability under the *Noerr-Pennington* doctrine,[2] *id.*, A-21, (2) refusing to instruct the jury that the FCC's power to order interconnection was relevant to the existence of monopoly power, *id.*, A-24 - A-26, and (3) refusing explicitly to instruct the jury concerning the regulatory framework as it pertained to misuse of monopoly power. *Id.*, A-26 - A-33. As to damages, the Court of Appeals further held that it was error to instruct the jury to assume petitioner would have had a monopoly if it had been allowed to interconnect and criticized petitioner's damages evidence in several respects. *Id.*, A-34 - A-36.

The petition seeks review only of some of the issues upon which the Court of Appeals based its decision on liability and damages.

REASONS FOR DENYING THE PETITION

The questions presented in the petition neither possess national importance nor otherwise are appropriate for review by this Court. The Court of Appeals' holdings concerning the standards for determining monopolization apply well settled principles to the specific facts of this case. They do not conflict with the decisions of any other court of appeals or with any applicable decision of this Court. Indeed, it is only by misstating the Court of Appeals' holdings that petitioner is able to argue that the Court of Appeals departed from the very principles petitioner purports to

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[2] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

accept. And the issue relating to the effect of income taxes on antitrust damages is not before this Court, for the Court of Appeals did not decide it, but merely identified the issue for consideration by the district court on the remand which was required on damages in any event.

Furthermore, because petitioner has not challenged the Court of Appeals' holdings that the trial court misapplied the *Noerr-Pennington* doctrine (Appendix at A-21) and that the damage determination was infected with several fundamental errors (in addition to the one purportedly raised) (Appendix at A-34 - A-36), the petition is in the nature of an interlocutory appeal. The case will be retried on both liability and damages regardless of the disposition made of this petition, and this underscores the inappropriateness of review of the issues petitioner raises. Indeed, Bell is the party primarily aggrieved by the decision because it must undergo a retrial *despite* its claim that its conduct is impliedly immune from antitrust liability. Bell has not cross-petitioned because the decision below is not a final disposition of the case and because the record is deficient for review of the immunity issue due to the evidentiary rulings of the trial court.

I. The Court Of Appeals Correctly Applied Established Criteria In Holding The Jury Had Been Erroneously Instructed Concerning The Elements of Monopolization.

Section 201(a) of the Communications Act, 47 U.S.C. §201(a), authorized the FCC to order Bell to interconnect with WTC if such interconnection was found to be in the "public interest." The district court held this provision did not immunize Bell from antitrust liability for refusal to interconnect voluntarily. It further held that, in the absence of immunity, §201(a) was absolutely irrelevant to the disposition of the case under the Sherman Act, and it refused to instruct the jury concerning the relevance of §201(a) to the questions of the existence of monopoly power and of misuse of monopoly power. The Court of Appeals held that this

was error. In so holding, the Court recognized the very point that the petition (p. 19) acknowledges—regulation is relevant "from a factual perspective" in applying the antitrust laws. *See Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602 (1974); Appendix at A-22.

A. Monopoly Power

The district court instructed the jury that Bell had monopoly power in the relevant market of providing telephone service in the Woodlands in that it "controlled" the long-distance facilities to which competitors must have access. The court refused to give Bell's proposed instruction that it must find that Bell had the power to exclude competition *despite* the FCC's authority under §201(a) of the Communications Act, 47 U.S.C. §201(a), to order interconnection. *See* Appendix at A-24 - A-25. The Court of Appeals held this was error because the fact that the FCC could compel Bell to provide interconnections was of undoubted relevance to whether Bell had the power to exclude WTC's entry. *Id.*, at A-26. This holding is simply a proper application of established antitrust principles.

Monopoly power exists only if a firm has the power "to control price or exclude entry," and whether a firm possesses such power is a question of fact to be determined in light of the characteristics of the industry. *See United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966). That the FCC had the authority to order Bell to provide interconnections to the toll network is "a fact of market life" that is of undoubted relevance to a determination whether Bell had the power to exclude entry. *See International Tel. & Tel. Co.* v. *General Tel. & Elec. Corp.*, 518 F.2d 913, 935-36 (9th Cir. 1975). Indeed, this Court has held that such "unique federal and state regulatory restraints" must be considered in applying antitrust laws to regulated firms that do not possess immunity. *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 627 (1974); *see Silver* v. *New York Stock Exchange*, 373

U.S. 341, 360-61 (1963). And the lower courts have uniformly held that regulatory provisions affecting a firm's ability to control price or exclude entry must be taken into account in determining if a defendant possesses monopoly power as a matter of fact.[3]

Petitioner misstates the Court of Appeals' holding when it asserts that the jury is required to decide the *legal* effect of §201(a). The jury's task on remand is to assess all the evidence in the record, including the existence of regulation, to determine whether Bell had the power to exclude entry as a matter of fact. It is not to determine whether §201(a) confers antitrust immunity. For this reason, *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), and *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), are irrelevant. These decisions involved only the *legal* question of whether Congress intended to immunize a particular industry from the antitrust laws, not the factual question of whether the structure and operation of the regulatory scheme was such that an individual firm had the power to exclude entry in a particular factual context.

B. Misuse of Monopoly Power

Bell's position at trial was that even if it possessed monopoly power, its refusal to interconnect with petitioner was not motivated by anticompetitive intent because it believed petitioner's request would produce wasteful duplication of service and facilities and would be inconsistent with §201(a). *See* Appendix at A-32 - A-33. The district court instructed the jury that Bell could

[3] *See, e.g., International Railways of Central America* v. *United Brands Co.*, 532 F.2d 231, 240 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *Travelers Ins. Co.* v. *Blue Cross of Western Pa.*, 361 F. Supp. 774, 780 (W.D. Pa. 1972), *aff'd*, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973); *Redwing Carriers, Inc.* v. *McKenzie Tank Lines, Inc.*, 443 F. Supp. 639, 641 (N.D. Fla. 1977), *aff'd*, 594 F.2d 114 (5th Cir. 1979); *Nankin Hospital* v. *Michigan Hosp. Service*, 361 F. Supp. 1199, 1209 (E.D. Mich. 1973). *See also* Watson & Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 Antitrust Bull. 559, 565-75 (1977).

be found liable if its refusal was based on an anticompetitive purpose or intent, but it refused to instruct the jury that it could consider the nature of the regulatory framework in ascertaining whether Bell willfully misused monopoly power. The Court of Appeals held that the failure to give the latter instruction was reversible error because the jury needed to understand the regulatory context in which Bell had acted in order to determine whether it had acted with an anticompetitive purpose, rejecting petitioner's assertion that the omission was "harmless error." *Id.*, at A-33 - A-34 n. 16.

Petitioner claims (pp. 13-14) that in so holding the Court of Appeals "abandoned the anticompetitive purpose or intent standard"—which it maintains is compelled by the decisions of this Court—and adopted instead an "unreasonableness" test under which reasonable attempts to comply with regulatory policy do not give rise to antitrust liability. This is a misstatement of the Court's holding. The Court of Appeals did *not* hold it was reversible error to give the anticompetitive purpose instruction.[4] The holding was only that the reasonableness of Bell's conduct under regulatory principles was relevant in determining whether it had anticompetitive intent, and the jury should thus be explicitly instructed as to the regulatory framework.[5]

To the extent petitioner is contending that consideration of regulatory policies is somehow inappropriate to antitrust determinations, the claim is contradicted by its own admission that the

[4]Indeed the Court of Appeals expressed the opinion that, for practical purposes, there are no significant differences between the two allegedly different tests. *See* Appendix at A-27 - A-28 n. 12.

[5]Accordingly, there is no substance to petitioner's claim (pp. 18-20) that the decision below somehow conflicts with *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978) and with *International Tel. & Tel. Co.* v. *General Tel. & Elec. Corp*, 518 F.2d 913 (9th Cir. 1975). The Court of Appeals applied the "frame of reference" of the antitrust laws and held that under the very standards petitioner purports to accept, the regulatory framework was a relevant "fact of market life."

issue of regulation is relevant to Bell's intent. *See* Appendix at A-32 n.15. More importantly, it is flatly contrary to *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), in which this Court rejected the claim that the regulatory scheme under the securities laws displaced the antitrust laws but went on to prescribe that in applying the antitrust laws to such regulated industries "(t)he proper approach is then to adopt an analysis which reconciles the operations of both statutory schemes with one another," *id.*, at 357, and permits the regulated firm "sufficient breathing space" to carry out the regulatory purposes. *Id.*, at 360-61. *See also United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 627 (1974); *Jacobi* v. *Bache & Co.*, 520 F.2d 1231, 1237-39 (2nd Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976) (Friendly, J.). Evidence that a firm is acting consistently with articulable concerns of regulatory policy is relevant to the issue of whether that firm willfully misused monopoly power in violation of the Sherman Act.

II. The Court Of Appeals' Statement In A Footnote Concerning The Possible Effect Of Federal Income Taxation On Antitrust Damages Presents No Basis For Review By This Court.

The Court of Appeals held that the trial court had erroneously instructed the jury, contrary to the evidence, that it was to assess damages on the assumption WTC would have enjoyed a monopoly and would be the only company serving the Woodlands if Bell had voluntarily interconnected. The final paragraphs of the opinion further criticized petitioner's damage model on several additional grounds, one of which was that its exhibits were inconsistent in the treatment of income taxation because one exhibit showed net profits *before* taxes and a second showed net income *after* deduction of income taxes. *See* Appendix at A-36 & n. 19. At the conclusion of the footnote, it stated "Cf. *Norfolk & Western Ry. Co.* v. *Liepelt*, ___ U.S. ___, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), for the Supreme Court's most recent pronouncement on the propriety of considering income taxes in damages awards."

Because the issue of the effect of income taxation on damages had not been briefed by the parties, it is evident that the court's statement was only a directive that taxation should be treated consistently in the damage model on retrial and in accordance with the law. It instructed the district court and the parties to focus on the issue of the correct treatment of taxes in computing antitrust damages on remand, where the damages issue will be retried in any event. Review of the Court of Appeals' *sua sponte* statement would be premature because neither it nor any lower court has explicitly focused on the issue.

CONCLUSION

The Court of Appeals correctly applied the principles established by this Court. The decision below does not conflict with the decision of any other court of appeals. Not only has the petition failed to show any reason why this Court should review any aspect of the decision, but its interlocutory character stands as an independent reason to deny the petition. The petition for certiorari should be denied.

Respectfully submitted,

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